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AN EVALUATION OF WASHINGTON MARRIAGE LAWS

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From ancient times up to the present day there has existed among sovereign states a traditional reluctance to legislate on matters concerning marriage. This attitude has been due largely to men's regard of the marital union as a personal status, something which by nature involved a considerable amount of individual freedom. As families began living together in large communities, it became necessary for social pressures in the form of custom and church law to attach certain responsibilities to marriage.[1] It was only after decades of unsocial practices culminated in a general desire for change, however, that drastic legislation on the subject appeared.[2] The decree of the Lateran Council of 1215 Innocent III, prescribing the publishing of the bans for countries in western Europe, originated for this reason.[3] Similarly, the public demand for the suppression of the Fleet marriages in England resulted in the passing of Lord Hardwicke's Act.[4]

Today the attitude of the public, as well as that of most law-making bodies, is still one of *laissez faire* towards this question of marriage laws. It is only when we realize that the problem is inherently involved with that of divorce, juvenile delinquency, pauperism and public health that the need for more scientific marriage legislation is made apparent. The appalling rate at which divorce and crime have increased in the United States in the last few years discloses serious deficiencies in those laws under which the family originates.[5]

Divorce, for example, has increased at a tremendous rate in recent years. According to one authority 201,468 divorces were granted in this country in 1929, or one in every two minutes; eighteen per cent of all American marriages or more than one in

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[1]See article by Judge Hoffman of Cincinnati Domestic Relations Court, in (1929) XXX CURRENT HISTORY 877. See also article, *Marriage and the State* (1911) LXXI INDEPENDENT 553-554.

[2]State regulation in the formative years of the common law was unknown. Marriage was left entirely up to the church, law courts dealing only with *de facto* marriages. II POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW (2d ed., 1923) 369-74.

[3]POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW (2d ed., 1923) 370-71.

[4]I HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 446.

[5]*Recent Social Trends*, a review of findings by President Hoover's Research Committee, Introduction, pp. 1, 5 reprinted N. Y. Times, Jan. 2, 1933, Sec. 2. See also (June, 1930) LIX WORLD'S WORK 23; (1932) CXIII LITERARY DIGEST 20.

every six end in divorce.[6] A contributing factor to this increasing divorce rate and one which is traceable directly to lax marriage laws, is the child marriage. This all too prevalent evil, condemned universally by sociologist and public official, emphasizes one of the weakest spots in modern marriage legislation.[7] Such widespread family disorganization is, of course, bound to have a direct effect on the amount of juvenile delinquency and pauperism in the United States. Both of these latter problems are matters of public concern which grow more serious each year. There are also attendant problems arising as a result of poor marriage laws, such as the steady increase in the number of physical and mental defectives. At least one per cent of our population is committed to state or federal institutions for the unfit, while many remain at large who should be thus confined.[8]

As to such problems as these just mentioned, public consciousness has been awakened for some years and signs of reform are to be seen. It remains for the law-making authorities to realize that many of the causes of the disintegration of the family unit originate at the time of the formation of the marriage status. Scientific laws on marriage, reasonably administered, can do a great deal towards eliminating those more pressing social problems which find their way to domestic relation courts, charitable organizations and state penal institutions.

The changing viewpoint of the courts on this subject is forcibly pointed out in the early Washington case of *In Re McLaughlin's Estate,*[9] in which our court declared the common-law marriage to be prohibited in this state as being against public policy. In the course of his opinion, Justice Scott made the following statement:

> "There is a growing belief that the welfare of society demands further restrictions in this direction, and that this will find voice in future legislation; that an institution of this kind, which is so closely and thoroughly related to the state should be most carefully guarded, and that improvident and improper marriages should be prevented. All wise and healthful regulations in this direction prohibiting such marriages as far as practicable would tend to the prevention of pauperism and crime,

[6] CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932) 15. See also XXX CURRENT HISTORY 276-82; III HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 254; III PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY 159; LICHTENBERGER, DIVORCE, A STUDY IN SOCIAL CAUSATION (1909) 97.

[7] GOODSELL, PROBLEMS OF THE FAMILY 442, note 9; RICHMOND AND HALL, CHILD MARRIAGES (1925) 58.

[8] LAUGHLIN, BULLETIN 10A, EUGENICS RECORD OFFICE (1922) 14-15. See also MAY, MENTAL DISEASES (1922) 25; (1934) XXIV AM. JOUR. PUB. HEALTH 1011-12; (1929) VII HYGEIA 250-254.

[9] 4 Wash. 470, 30 Pac. 651, 16 L. R. A. 699 (1892).

> and the transmission of hereditary diseases and defects, and it may not be regarded as too chimerical to say that in the future laws may be passed looking to this end. Certainly it is a legitimate subject for legislation, for the state has an interest in each act, contract, and relation of its individual members that in anywise affects the public welfare, or tends to injury in various ways as the government of man approaches greater degrees of perfection, and the rights, relations, and the responsibilities of one person with regard to another, and to all others, become better understood. Every thoughtful person would desire this should be so, even though in some cases it might seem to result in individual hardship."

THE CREATION OF THE MARRIAGE STATUS IN WASHINGTON

Traditionally the marriage status has been created in one of two ways, either by the giving of mutual consent to the union by the parties after the manner of forming a private contract, or by entering the contract according to the regulations prescribed by the state. A consideration of the marriage status necessarily involves an examination of the validity of the former of these two methods, *namely,* the common-law marriage.

One of the earliest attempts to give marriages a certain degree of formality and notoriety was the decree of the Lateran Council of 1215 Innocent III, which prescribed the publishing of the bans in all Catholic countries in western Christendom. The clandestine marriage flourished, however, in spite of this decree. It remained for the Council of Trent (1543-1563), representing the authority of the Church on the continent, to outlaw the secret marriage by declaring all marriages void unless performed in the presence of the parish priest, according to the manner prescribed by the Church.[10] The same problem was legislated upon in England by the passing of Lord Hardwicke's Act, 26 Geo. II, c. 33 (1753).[11] Evasion of this statute which required the publishing of the bans and a religious ceremony, entailed the danger of punishment as a felon and of having the marriage declared void. Since the law did not apply to Scotland secret marriages were not entirely abolished, for a marriage of English subjects on Scottish soil by mere private agreement received the sanction of the English courts which applied the law of the place of ceremony. Thus arose the now famous Gretna Green marriages.

With the variety of religions in the American colonies, the

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[10] JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS (1933) 359, note 8. See also II POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW (2d ed., 1923) 369-74; Hallett v. Collins, 13 U. S. (L. Ed.) 376, 10 How. 174 (1850); KOEGEL, COMMON LAW MARRIAGES (1922) 26.

[11] I HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 435-437; ASHTON, THE FLEET, 233-237, 331; KOEGEL, *op. cit. supra* note 10, 29-30.

dearth of legislative control, the absence of an established church, and the great distances which rendered access to church and clergy quite difficult, it was natural that the common-law marriage flourished.[12] Chancellor Kent in 1809 in *Fenton v. Reed*,[13] and later in his commentaries,[14] gave impetus to the growth of the secret marriage in this country. In the United States today, "informal marriages based on mutual assent, without ceremony or officiant, have been considered valid as common-law marriages by a majority of the States".[15]

In Washington a common-law marriage is void if contracted within the state. This rule was established by the case of *In Re McLaughlin's Estate*[16] where the secret marriage was held to be contrary to good morals and public policy. This policy of preventing secret marriages has been somewhat weakened by later decisions in this state which indicate that a common-law marriage, valid in the state where celebrated, and not a mere illicit and meretricious cohabitation, will be recognized as valid in Washington.[17]

The rule of the *McLaughlin* case is an important step towards insuring permanent recordation of marriages, and it allows a degree of desirable administrative control over licensing and the ceremony which could not be obtained if the secret marriage were recognized. There is no doubt that the common-law marriage is socially undesirable, and most authorities on the problem would agree with the following statement by Richmond and Hall in their text, *Marriage and the State*:

> "One of the arguments against allowing the common-law marriage, as it is called, to circulate on a parity with the licensed and ceremonial marriage is the fact that, under any such double standard, statutory law and its public administration can regulate the one and not the other. A common-law marriage is an unlicensed and unrecorded marriage. It is an anachronism, as we have said

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[12] MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 50; RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 22, 25-26, 30; GOODSELL, PROBLEMS OF THE FAMILY (1928) 79; III HOWARD, *op. cit. supra* note 11, 171-74.

[13] 4 Johns 52, 4 Am. Dec. 244 (1809).

[14] 2 KENT'S COMM. 26.

[15] MAY, MARRIAGE LAWS AND DECISIONS (1930) 29; I VERNIER, AMERICAN FAMILY LAWS (1931) § 26.

[16] 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699 (1892).

[17] Stans v. Baitey, 9 Wash. 115, 37 Pac. 316 (1894); Blodgett v. Blodgett, 109 Wash. 597, 187 Pac. 340 (1920). See also Comment (1925) I WASH. LAW REV. 277. This rule is in accord with the conflict of laws principle by which the local jurisdiction recognizes the marriage as valid, if valid in the state of ceremony and not repugnant to a strong policy of said local jurisdiction. In Re Wilbur's Estate, 8 Wash. 35, 35 Pac. 407 (1894), 14 Wash. 242, 44 Pac. 262 (1896); State v. Fenn, 47 Wash. 561, 92 Pac. 417 (1907); RESTATEMENT, CONFLICT OF LAWS, §§ 131, 140, 141; MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) § 27.

> before, that such marriages continue to be recognized in half of our states today. A further argument against them is this: A licensed marriage on the date of its celebration, or as soon thereafter as the required return is made to the license officer, becomes a matter of permanent, official record, while a marriage based on consent alone remains so nebulous, so confused and undocumented, that the courts of the very states that still grant recognition to it have difficulty in deciding what constitutes a common-law marriage and what does not."[18]

Although Washington does not recognize the common-law marriage, there is in our law the doctrine of presumption of validity of marriage which leads to similar results. This presumption, which arises whenever a man and woman cohabit as husband and wife and hold themselves out openly as such, probably does in fact operate to make valid many common-law marriages where proof of the lack of ceremony is unavailable.[19] The presumption is, of course, rebuttable by clear evidence showing no marriage in fact, or by such evidence as would raise grave doubts as to the good faith of the parties so cohabiting.[20] The policy of the state, it is believed, is best served by endeavoring to validate *de facto* marriages whenever possible.[21]

The effect of this presumption is to detract considerably from the force of the *McLaughlin* rule insofar as the latter may tend to discourage the informal marriage. It should be noted, however, that the presumption is applied in those cases in which a couple have been living as man and wife. Usually the family is also composed of one or more children. So far as the state is concerned, it is better that the *de facto* union be recognized as a legal relationship, if this can be done without violating the *McLaughlin* rule. It is better for the family to remain a self-supporting unit

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[18]MARRIAGE AND THE STATE (1929) 293. In accord see HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 170, 184 (1904); GOODSELL, PROBLEMS OF THE FAMILY (1928) 441, 444.

[19]Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84 (1903); Shank v. Wilson, 33 Wash. 612, 74 Pac. 812 (1903); State v. Nelson, 39 Wash. 221, 81 Pac. 721 (1905); Potter v. Potter, 45 Wash. 401, 88 Pac. 625 (1907); Nelson v. Carlson, 48 Wash. 651, 94 Pac. 477 (1908); In Re Sloan's Estate, 50 Wash. 86, 96 Pac. 684 (1908), 63 Wash. 623, 116 Pac. 272 (1911); Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822 (1909), 63 Wash. 526, 115 Pac. 1078 (1911); Potts v. Potts, 81 Wash. 27, 142 Pac. 448 (1914); In Re Emman's Estate, 117 Wash. 182, 200 Pac. 1117 (1921); In Re Wren's Estate, 163 Wash. 65, 299 Pac. 972 (1931). State v. Wheeler, 93 Wash. 538, 161 Pac. 373 (1916), to the effect that where marriage is an element of a crime, it must be proven explicitly, and the presumption will not be relied upon.

[20]State ex rel. Bentley v. Frenger, 158 Wash. 683, 291 Pac. 1089 (1930); In Re Anderson's Estate, 163 Wash. 228, 171 Wash. 385, 17 P. (2d) 889 (1933).

[21]Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84 (1903); Thomas v. Thomas, 53 Wash. 297, 101 Pac. 865 (1909).

than to have its members thrown upon public charity as a result of a decree of nullity of marriage by the court. Only in clear cases should the union be deemed void as a common-law marriage, for if this means of vindicating the law be adopted too generally it would result in social conditions even worse than those which the law is trying to remedy.

The statutory method is the sole means of creating a valid marriage in Washington. The legislature has declared marriage to be a civil contract.[22] The state, however, is a party to the contract to the extent that its sanction of the union must be obtained by proper compliance with the marriage laws, and its consent had in order to dissolve the contract. The usual doctrines of contract law apply to marriages, both as to formation and performance, except as the impact of public policy and social expediency vary the rule. Thus, for instance, the tests for capacity are different; the power to rescind by agreement is destroyed; the power of a minor to disclaim, if the marriage was lawfully intered into, is gone; and the constitutional restriction against impairment by the states does not apply.[23]

As to the age limit for entering the marriage contract, our court has held that the common law age of twelve for females and fourteen for males is the minimum in this state. Two statutes have been relied upon at one time or another in attempting to establish a higher age limit for a valid marriage in the state. The first is that which states that marriage may be entered into by males of the age of twenty-one and females of the age of eighteen;[24] the other is the licensing section which requires parental consent for marriages by males under twenty-one and females under eighteen and prohibits females under the age of fifteen from obtaining a license under any circumstances.[25] In the case of *In Re Hollopeter*,[26] the parents of a fourteen-year-old girl tried unsuccessfully to avoid her marriage to a nineteen-year-old youth who had forged the parents' signatures in order to obtain a license. It was decided that the marriage was valid even though the parties were under the age at which they could obtain a license. The court said the

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[22]WASH. REM. REV. STAT., § 8437: "Marriage is a civil contract which may be entered into by males of the age of twenty-one years, and females of the age of eighteen years, who are otherwise capable."

[23]Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. Rep. 723, 31 L. Ed. 654 (1888); VERNIER, *op. cit. supra* note 15, § 15; State v. Tutty, 41 F. 753, 7 L. R. A. 50 (D. C., Ga., 1890). The power of the state to legislate concerning the marriage status is inherent in its sovereignty. Maynard v. Hill, *supra;* MADDEN, PERSONS AND DOMESTIC RELATIONS 5.

[24]WASH. REM. REV. STAT. § 8437.

[25]WASH. REM. REV. STAT. § 8451.

[26]52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847, 132 A. S. R. 952 (1909).

license law was merely a regulatory one affecting licenses and in no way established a minimum age for marrying. Although in fact a license was obtained here, the court cited with approval the statement that "In the absence of any express declaration that a marriage without a license is void, the marriage is universally held to be valid." In a later case[27] the court again declared that the licensing section of the code did not affect the minimum age for entering the marriage contract.

Thus it seems clear that in Washington this decidedly low age limit is well established as the legal minimum. Here is one point where a change in our laws would be socially desirable; a higher age limit is most necessary to the effective enforcement of the policy of the state in preventing marriages from being formed which are, in many instances, doomed to failure. This view is well stated by Professor Vernier:

> "The early marriageable age sanctioned by the common law is certainly not defensible in the light of modern social and economic conditions. The widespread tendency to require a higher marriageable age of consent is a recognition of this fact and is one of the progressive developments in our marriage law that should be continued."[28]

There are a number of statutory disqualifications in our marriage laws. One section prohibits the marriage, first, when either party has a wife or husband living at the time of such marriage.[29] Bigamous marriages are held void *ab initio,*[30] although a decree of nullity will be granted to clear up doubt as to the facts and to make a permanent record thereof in the interests of public safety.[31] Here, again, the state vindicates a desirable policy by the severe method of breaking up the family unit, with the attendant harsh results on the individuals involved. This is the traditional approach to this particular problem and, as in the case of the common-law marriage, the severity of the penalty can only be justified by the fact that it is an effective one.

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[27]Cushman v. Cushman, 80 Wash. 615, 142 Pac. 26 (1914).

[28]I VERNIER, AMERICAN FAMILY LAWS (1931) § 29. See also HOWARD, MARRIAGE AND THE FAMILY (1914) xxiii, xxiv; GOODSELL, PROBLEMS OF THE FAMILY (1928) 442; RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) Chap. VI.

It is to be noted that the fact that a marriage may be declared void if parties are under a minimum age may not deter violations as effectively as the perjury law or other penalties imposed when one obtains a license by falsification. And without a license, there is not much chance that a couple could be married; too few officiants would run the risk of performing the ceremony without requiring a license.

[29]WASH. REM. REV. STAT. § 8438. See *id.* §§ 2453-4 for criminal penalties.

[30]Beyrle v. Bartsch, 111 Wash. 287, 190 Pac. 239 (1920); Blodgett v. Blodgett, 109 Wash. 597, 187 Pac. 340 (1920). See VERNIER *op. cit. supra* note 15, § 46, holding this to be the American rule.

[31]Beyrle v. Bartsch *supra* note 30. Accord: Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 A. S. R. 53 (1905).

In proper cases the court tempers the harshness of the rule. If, for instance, a woman marries in good faith without knowing of her husband's legal incapacity due to an existing valid marriage, she may secure an annulment and an equitable distribution of the property mutually acquired during cohabitation.[32] If there are two conflicting marriages before a court, the person asserting the validity of the second marriage is aided by a rebuttable presumption that the second marriage is valid, and that the first was dissolved by death or divorce.[33] This presumption is based on the probability that in fact one already married will not marry a second time. Being a presumption of innocence, it achieves the policy of validating matrimonial unions wherever possible.

Subsections two and three of this section[34] relate to the prohibition against marriage within the prohibited degrees. Subsection two *prohibits* marriages where "the parties thereto are nearer of kin to each other than second cousins, whether of the whole or half blood, computing by the rules of civil law." Subsection three makes it *unlawful* for any man to marry his father's or mother's sister, his own daughter or sister, his granddaughter, or his niece; likewise a woman is enjoined from marrying her father's or mother's brother, her own son or brother, her grandson or her nephew. Although not expressly declared void, these unlawful marriages are so offensive to the courts that they are regarded as void.[35] As in the case of the common-law and bigamous marriages, the severe penalty is held to be justified by the policy which it protects.

While the rigorous adherence to these traditional doctrines of our domestic law follow perhaps from the social concept of decency, at the same time society does make certain thoughtless sacrifices, *namely*, the bastardization of the children of such relationships. Perhaps it would be better under all aspects of this section[36] to

[32]In Re Brenchley's Estate, 96 Wash. 223, 164 Pac. 913 (1917); Powers v. Powers, 117 Wash. 248, 200 Pac. 1080 (1921). These cases follow the doctrine laid down by the case of Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 A. S. R. 900 (1908), to the effect that the inherent powers of a court of equity justifies a division of property acquired by the two spouses during cohabitation, even though there be no valid marriage before the court to be dissolved, as would be the case in a divorce suit.

[33]Donofrio v. Donofrio, 167 Wash. 80, 8 P. (2d) 966 (1932); Spears v. Spears, 178 Ark. 720, 12 S. W. (2d) 875 (1928); Doertch v. Folwell Engineering Co., 252 Mich. 460, 231 N. W. 40 (1930); Phillips v. Wilson, 298 Mo. 186, 250 S. W. 408 (1923). It is submitted that this presumption is almost impossible for one asserting the priority and continued validity of the first marriage to overcome. It means proving a negative, *i. e.*, that no death or divorce occurred in any jurisdiction.

[34]WASH. REM. REV. STAT. § 8438. See *id.* § 2455 for criminal penalties.

[35]Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 A. L. R. (N. S.) 179 (1910).

[36]WASH. REM. REV. STAT. § 8438.

follow the practice of some states and make bigamy grounds for divorce.[37] An even more satisfactory solution would be to adopt a law whereby the decree of nullity of marriage carries with it a provision for legitimizing all children born of the union.[38] There would still be left the severe criminal penalties of incest and bigamy to deter wrongdoers.[39]

A second regulatory statute setting forth disqualifications reads as follows:

> "No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five, either of whom is a common-drunkard, habitual criminal, insane person, or person who has theretofore been afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, shall hereafter intermarry or marry any other person within this state."[40]

Marriages in violation of this section have been held voidable at worst, although the policy of holding a marriage of first cousins void and one between persons afflicted with the above-mentioned diseases voidable is debatable. It is difficult to distinguish which union would have the more socially disastrous results. In the case of *In Re Hollingsworth's Estate*[41] our court held the marriage of a feeble-minded woman was not void because of violation of this law, stating that "a marriage between persons of a class that the statute simply says *shall not marry*,[42] that statute being provided by a provision of a regulatory sort, and providing for punishment of offenders, is not void in the absence of a declaration in the statute that such marriage is void". Evidently this type of marriage is not so offensive to the court that it will be willing to impose the harsh penalty of a decree of nullity.

With reference to the difference in civil penalties just noted, it may well be urged that the effect of a court's declaring a marriage void or voidable will make but little difference in the prevention of undesirable unions. Experience shows that certain persons desiring to marry will continue to enter into *de facto* relationships in spite of the threat of a decree of nullity of marriage. They will continue to falsify facts about their health or mental capacity. Once married, they will produce offspring regardless of what a court may later decree concerning their marital

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[37]VERNIER, AMERICAN FAMILY LAWS, §§ 38, 42, 73.

[38]ARIZ. REV. CODE ANN. (1928) § 273, an excellent example of such a provision.

[39]WASH. REM. REV. STAT. § 2455 (incest); WASH. REM. REV. STAT. §§ 2453-54 (bigamy).

[40]WASH. REM. REV. STAT. § 8439.

[41]145 Wash. 509, 261 Pac. 403 (1927), (1928) 3 WASH. LAW REV. 57.

[42]Author's italics.

union. It may be concluded that the problem of preventing such marriages must be met in its initial stages by laws enforced through the assistance of the license issuer and the marriage officiant and backed up by the threat of criminal penalties.

In considering disqualifications for marriage, it may be well to note one other statute of a regulatory nature, which states:

> "When either party to a marriage shall be incapable of consenting thereto, for want of legal age or a sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed."[43]

This statute can only be available to the person suffering from the disability; for example, the parents of either spouse are excluded from asserting the right to avoid a child's marriage.[44] In the case of *Waughop v. Waughop*,[45] the Washington court allowed a husband to annul a marriage which he had been induced to enter by his wife while she, as his nurse, had him under the influence of drugs. It was said in this decision that there can be neither consummation nor ratification as long as the incapacity, derangement or undue influence continues, and where, as here, the husband was unable to comprehend the nature of the contract, and had not ratified it after regaining his understanding, he could annul the marriage. There seems to be no reason why insanity, idiocy, feeble-mindedness or drunkenness at the time of the ceremony would not also give similar grounds for annulment under this view.[46]

The ineffectiveness of this section[47] may be observed from the fact that the statute permits only the spouse suffering under the disability to avoid the marriage. If that party does not wish to so avoid, the other spouse is helpless unless possibly he or she can assert a fraudulent concealment in the inception of the contract. The statute fails to take into account the situation which could exist whenever a couple disregards the inhibition of the section prohibiting marriage where certain physical or mental ailments exist.[48] If the license issuer or the marriage celebrant fail to prevent the marriage, the state can do nothing beyond inflicting

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[43]WASH. REM. REV. STAT. § 8449.

[44]In Re Hollopeter, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847 (1909).

[45]82 Wash. 69, 143 Pac. 444 (1914).

[46]See In Re Gregorson's Estate, 160 Cal. 21, 116 Pac. 60 (1911); Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323 (1890); Prine v. Prine, 36 Fla. 676, 18 So. 781 (1895); note 34 L. R. A. 87, stating that *non compos mentis* is required.

[47]WASH. REM. REV. STAT. § 8449.

[48]WASH. REM. REV. STAT. § 8439.

the statutory penalty. The parties, meanwhile, are permitted to continue their relationship and to procreate defective offspring, thus openly flouting the announced public policy of the state.[49]

In addition to those already mentioned, there are certain additional criminal penalties set forth in our marriage statutes for violations of the sections as to age and disqualifications.[50] Perjury as to age may result in the prosecution of the youthful offenders.[51] Violations of section 8439 are specifically punishable under section 8452 which provides for a fine of not more than one thousand dollars or imprisonment for not more than three years, or both.

Authors Richmond and Hall have indicated several reasons for the failure of these police measures to serve as deterrents in marriage law violation cases.[52] They cite the public indifference or *laissez faire* attitude in regard to such prosecutions generally, the reluctance of officials to prosecute unless a third party brings the complaint, and the difficulty in securing convictions for perjury. They propose as an alternative a greater effort to prevent these violations in the first instance. The suggestion is a very interesting one for it preserves the criminal penalty as a deterrent for what it is worth and at the same time emphasizes prevention of unsocial marriages by the license office in place of breaking up the family unit by a nullity decree. Such an approach to the problem places the license office as the primary point of control in preventing marriage law violations.

THE MARRIAGE LICENSE OFFICE—A PRIMARY POINT OF CONTROL

The license system, a comparatively recent development in the administration of laws regulating marriage, had its origin in early English ecclesiastical custom whereby the license of the bishop was occasionally given to release candidates from publishing their bans in church. As the state gradually came to assume control of marriage on the continent and to supplant the domination of the church in this respect, there grew up the concept of an obligatory civil marriage to which a religious marriage was merely supple-

[49]One possible way out of this dilemma does exist for the sane spouse in the case of insanity; if the incapacitated party is institutionalized for five years by order of the court, then a divorce will be open to the former party under WASH. REM. REV. STAT. §§ 982-9.

[50]WASH. REM. REV. STAT. §§ 8437, 8438, 8439.

[51]WASH. REM. REV. STAT. § 8451.

[52]MARRIAGE AND THE STATE, Chap. 14, § 3, *Penalties*. See also, *Brooks, Marriage and Divorce in America* (1905) LXXXIV FORTNIGHTLY REVIEW 334, stating: "The greatest abuse of all in American marriage laws is that in nearly one-half of the states they have been construed by the courts as 'directory' and not 'mandatory' . . . until it is rigorously decreed that no marriage contracted within the borders of a state is valid unless all the forms and conditions prescribed by the laws of that state have been complied with, the first essential improvement is wanting."

mentary. England and America, however, adopted the dual or optional concept of the marriage ceremony, with a choice of a civil or religious ritual. From necessity, therefore, these latter countries seized upon the marriage license as a means of centralizing some degree of control in the state. With minor exceptions, states now require all persons contemplating marriage to obtain a proper license.[53]

Statutes governing the duties of the license issuer in Washington are few in number and far from specific as to his powers and duties. Under one section the couple is to secure a marriage license from the county auditor authorizing any person or religious organization or congregation to join them in marriage.[54] Although Washington does not recognize the common-law marriage, it recognizes a marriage solemnized before a person having apparent authority to perform the duties of a minister or civil officiant even though no license has been obtained; in other words, if the marriage is otherwise valid, absence of a license appears not to invalidate the marriage.[55]

The section which is the source of all the license issuer's powers and duties, reads as follows:

> "The county auditor, before a marriage license is issued, upon the payment of a license fee of two dollars, shall require each applicant therefor to make and file in his office upon blanks to be provided by the county for that purpose, an affidavit showing that such applicant is not feeble-minded, an imbecile, epileptic, insane, a common drunkard, or afflicted with pulmonary tuberculosis in its advanced stages; Provided, that in addition, the affidavit of the male applicant for such marriage license shall show that such male is not afflicted with any contagious venereal disease. He shall also require an affidavit of some disinterested credible person showing that neither of said persons is a habitual criminal, and that the female is over the age of 18 and the male is over the age of 21 years; Provided that if the consent in writing is obtained of the father, mother, or legal guard-

[53] MARRIAGE AND THE STATE, *op. cit. supra* note 28, 17-19, 45.

[54] WASH. REM. REV. STAT. § 8450.

[55] Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822 (1909), 63 Wash. 526, 115 Pac. 1078 (1911). See also MARRIAGE AND THE STATE, *op. cit. supra* note 15, 41-42, stating: ". . . unlicensed marriages, though forbidden, are not invalid for that reason unless the state law specifically declares them to be so . . ." Accord: 18 R. C. L. 399.

At first glance it might seem that such a rule would remove the teeth of the licensing law. Experience shows, however, that persons will not generally attempt marriage without first obtaining a license, and even if they did, it is very improbable that a marriage officiant would attempt a ceremony without first demanding the license, since failure on the latter's part to comply with the marriage laws subjects him to a severe penalty.

> ian of the person for whom the license is required, the license may be granted in cases where the female is under the age of 18 years or the male is under the age of 21 years; Provided, that no consent shall be given, nor license issued, unless such female be over the age of 15 years. Such affidavit may be subscribed and sworn to before any person authorized to administer oaths. Anyone knowingly swearing falsely to any of the statements contained in the affidavits mentioned in this act shall be deemed guilty of perjury and punished as provided by the laws of the state of Washington."[56]

In addition to the penalty for perjury contained in the above section, section 8453, *Wash. Rem. Rev. Stat.*, also applies here, penalizing any person, including the license issuer, for violating any of the provisions of that section.[57] Before delivering the license, the auditor must enter in his marriage record a memorandum of the names of the parties, the consent of parent or guardian, if any, the names of the affiants, the substance of the affidavits upon which said license is issued, and the date of the license.[58] These comprise the duties of the license issuer.

The total fee of three dollars, two dollars being required for the license,[59] and one dollar for the marriage certificate,[60] goes into the county treasury, the county officers receiving a salary in full compensation for their services.[61] This feature of our marriage laws is a valuable adjunct to the proper administration of the marriage statutes inasmuch as the existence of the fee system for marriage license issuance induces collusion between the issuer and the officiant and leads to the commercializing of marriages, a practice which forces a conscientious issuer to relinquish income in order to promote the welfare of the state.[62]

In a survey conducted by the writer among the various license offices throughout the state, twenty counties out of thirty-nine returned answers to twenty-six specific questions asked of them concerning the function of their offices in administering marriage

[56]WASH. REM. REV. STAT. § 8451.

[57]State v Wilson, 83 Wash. 419, 145 Pac. 445 (1915). Because of the inability of the common law definition of perjury to cover this violation, the state has made a specific penalty under this statute. See also general penalties for nonfeasance in office, WASH. REM. REV. STAT., §§ 2268, 2269.

[58]WASH. REM. REV. STAT. § 8453. See also WASH. REM. REV. STAT. §§ 1372-77, requiring the clerk of the court to keep a record of marriages; § 1276 providing for the restoration of lost records. Cushman v. Cushman, 80 Wash. 615, 142 Pac. 26 (1914), designates § 8451 as "only a regulation concerning the issuance of a license to marry and in no wise affecting the marriage status."

[59]WASH. REM. REV. STAT. § 8451.

[60]WASH. REM. REV. STAT. § 8446.

[61]See WASH. REM. REV. STAT. §§ 4105, 4211, relating to collection and deposit of fees.

[62]RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 342.

laws. The conclusions reached from some of these returns will be briefly reviewed in order to designate certain specific problems in the matter of license issuance procedure.

Definition of issuers' powers and duties—use of implied powers. Outside of the limited provisions of our statutes, there appears to be no further definition of the duties of a license issuer. There is no central state bureau which disseminates information relative to the enforcement of these laws. Most of the auditors' offices stated that they felt compelled to grant a license in all cases unless the statute, as they understood it, was clearly violated. Two offices at times relied upon advice from the local prosecuting attorney or the attorney-general's office before granting a license in questionable cases. Can the auditor refuse to grant a license when he feels that the parties are under age, when a "professional" witness appears for the couple, when one party obtained a foreign divorce decree to dissolve a prior marriage, when the applicants are intoxicated, or when there is likelihood that the applicants are perjuring themselves in their affidavits? None of the auditors replying seemed to know just how far the issuer may go in each of these cases without subjecting himself to mandamus proceedings. The result is a different interpretation of the duties of the license office in each county; hence, although one county be as careful as possible in trying to carry out the spirit of the law and refuse to issue a license in a questionable case, the couple may easily obtain a license in a neighboring county. It would certainly seem that the licensing law should be more specific in defining the issuer's powers and thus eliminate much of the uncertainty that now exists in license offices over these questions. Richmond and Hall have made a similar suggestion, in stating:

> "In places both large and small the official charged with this duty performs it without supervision. His administrative procedures are standardized by nothing save a marriage law which is usually vague as regards administrative details . . . Probably the greatest single advance of all in the marriage license system of today will be made when every state has provided for detailed state supervision of all marriage license issue and has developed among them an *esprit de corps* and a professional interest in their task that is found only among a minority of issuers."[63]

Even as the situation stands today, there seems to be some leeway afforded the license issuer to give effectiveness to the spirit of the licensing laws. Heavy penalties levied upon him for violations of the law suggest that he must perforce have some discre-

[63]MARRIAGE AND THE STATE, *op. cit. supra* note 62, 46.

tionary powers. There is the section which requires an affidavit from some *disinterested credible person* as a witness.[64] This leaves the determination of such qualifications up to the auditor and provides him with a weapon with which to curb the activities of the "professional" witness.[65]

That the courts, when presented with the question, are inclined towards liberality in defining the license issuer's powers is illustrated by the recent New York case of *Alzmann v. Maher*,[66] decided in 1930. The plaintiff here sought a license to marry and was refused the same by the deputy issuer because the latter doubted the validity of the plaintiff's Mexican divorce decree, a certified copy of which was produced at the license office. Advice from the corporation counsel's office was relied upon by the deputy. The lower court held that mandamus could be brought against the clerk since it was not for him "to inquire into the efficacy of the decree of a sister state or even a foreign tribunal for the purpose of determining whether there exists a legal impediment". The Appellate Division reversed the ruling and held that the clerk's position was in part discretionary, giving him the right to make further inquiries to determine an applicant's right to a license where he believes there is cause to so do. Said the court, "While it is true that the defendant is a ministerial officer, he is invested with a measure of judicial or quasi-judicial authority . . . It would be inconsistent for a court of this state to direct an officer to issue a marriage certificate [license?] when the known facts would justify an indictment and conviction for bigamy if the marriage were contracted."

Proof of age. This problem is one of the most difficult facing the license issuer today; six of our auditors regard it as the most troublesome situation confronting them in their endeavor to comply with the law. It seems that with the growing efficiency with

[64] WASH. REM. REV. STAT. § 8451.

[65] MARRIAGE AND THE STATE, *op. cit. supra* note 62, 56-58.

[66] 231 App. Div. 139, 246 N. Y. S. 60 (1930). A note to this case written just after the decision of the trial court, in 30 COL. L. REV. 892, suggests that where questions of fact are fairly easy of ascertainment, it might be a good policy to increase the issuer's discretionary powers and lessen the number of annulments. But the note writer queries the policy of extending this discretionary power so as to involve the clerk in puzzling questions of law.

Another note writer in (1936) 4 U. OF CHI. L. REV. 122, in criticizing the Illinois Legislature House Bill No. 919, suggests that it should include requirements that both parties apply for a license, documentary proof of age, and that the license be issued in only such counties as either or both applicants have residence. He cites with approval the N. C. CODE ANN. No. 2503 (1935), which provides that the license issuer must make "reasonable inquiry" and makes him subject to civil liability to parents or guardians if he fails to exercise such care in granting licenses.

which birth records are being obtained and preserved, this problem could be met by allowing the auditor to require the production of a certified copy of a birth certificate in such cases as in his discretion raise a question as to the proper age. This would prevent child marriages and would not be an undue hardship upon applicants.[67]

Manner of issuance of licenses. Administrative practices differ widely here. The time taken for issuing the license varies from five to twenty minutes in different counties. Issuance of licenses out of hours occurs in many offices, often for additional remuneration to the issuer for his trouble. This latter practice occurs only a few times a month in some counties, only in emergencies in other counties, and finally, in one county, in twenty per cent of all cases where licenses are issued.[68] As to who shall appear at the office, no uniformity of practice was shown by the survey. Though both parties are usually requested to appear for their license in most counties, if their affidavits are forthcoming, they will be able to get a license in three counties even though only one of them appears; in eight counties, if they apply by mail; in three offices, if they are represented by proxy; and in one county, by any means they wish. This information is submitted to emphasize the lack of uniformity in practice among the county license offices and to point out how easy it is for marriage laws to be evaded where license issuing is so loosely carried out. The need for standardization of procedure here is obvious.

Checking unreturned licenses. Once a license is issued it is valid in any county in the state. Those license issuers questioned on the point revealed that they had no way of determining what became of a license until a certificate of marriage is sent in to the clerk of the court by the marriage celebrant after the ceremony. Although officiants are required under penalty by statute to make returns within thirty days after the ceremony, there has been an all too prevalent failure by these officials to comply with the law. The result is that many persons will be unable to prove the fact of their marriage except by producing witnesses to the ceremony. A more serious situation may arise, as follows: In the case of

[67]RICHMOND AND HALL, CHILD MARRIAGES (1925) 132. See also, RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 178. A desirable verification law is N. Y. DOMESTIC RELATIONS LAW § 15 as amended by N. Y. Laws 1932, c. 285, providing in part: "If the town or city clerk shall be in doubt as to whether the applicant claiming to be over 21 years of age is actually over 21 years of age, he shall before issuing the license require documentary proof as above defined."

[68]See RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 163, stating: "The characteristic of out-of-hour applications as we have observed them . . . suggest that a majority of them are followed by hasty marriages . . ."

Meton v. State Industrial Insurance Dept.,[69] a man and women of Polish nationality applied for a license and relied on an interpreter when at the license office. Not having the necessary disinterested witness, they were given a form of an affidavit and told to return it properly filled out by a qualified witness. The parties never returned, but cohabited as man and wife until the death of the husband, raising a family and believing that the form given them was a certificate of marriage. The court decreed the marriage void and bastardized the children of the union.

Many issuers questioned favored limiting the life of the licenses. Better still, however, is a revision of office procedure by the license issuer. If he were to write to the applicants after having failed to receive a return of a marriage certificate within a few months after issuing the license, he could inform them that if they had been married, no record of the fact had reached his office. If the candidates had been married, they would want a record of the fact and would bring pressure upon the tardy officiant (whose identity in most cases would be known only to them) and this official would then return the certificate of marriage. Of course, if the license had not been used, no harm would be done by the precautionary measure.

Inter-county co-operation. According to the auditors who were interviewed there appears to be little or no co-operation between counties in preventing the issuance of licenses in neighboring jurisdictions wherever a particular office refuses a license for cause. A central "clearing house" of some description is needed for the exchange of ideas and information, for facilitating inter-county participation in marriage law enforcement, and for studying proposed reforms in marriage legislation and making recommendations to public officials and to the legislature.

It is apparent that much remains to be done in the revising of purely administrative procedure in the county marriage license office. The difficulty in determining the scope of his powers and duties, the reluctance against probing too deeply into the qualifications of candidates in any case and the obvious defects in certain of our marriage laws has led the license issuer to regard his duties in these matters as ministerial. The result is a laxness and inefficiency in the carrying out of the spirit of the law which compels the conclusion that the license office is far from fulfilling its function as the primary point of control in the enforcement of our marriage laws.

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[69]104 Wash. 652, 177 Pac. 696 (1919). See also MARRIAGE AND THE STATE, *op. cit. supra* note 68, 295-298.

THE MARRIAGE OFFICIANT—A SECONDARY POINT OF CONTROL

It is inevitable that certain important functions remain to be performed by the marriage officiant if the state is to have adequate marriage legislation. Participation in the marriage ceremony by this official, whether he be a public officer or a member of the clergy, gives him an opportunity to discourage violations of the law. How far he will co-operate towards this end depends on a number of things. In the case of the clergyman these factors will be the attitude of the church of which he is a member towards the problem, the sentiment of his congregation, and his own appreciation of the social position which he occupies. On the other hand, if the officiant be a civil officer, public opinion and his own sense of civic responsibility are determining factors after the same fashion.

By statute, the following officials may solemnize marriages in Washington: Judges of the supreme court, judges of the several superior courts, any regularly licensed or ordained minister or any priest of any church or religious denomination anywhere within the state, and justices of the peace within their respective counties.[70] Proof of the performance of the ceremony by an authorized officer raises a presumption of its legality.[71] In most states, this policy of upholding matrimonial unions wherever possible is also manifested by the general rule that the lack of proper authority in the officiant will not nullify the marriage.[72] Such a law has been adopted by Washington in a section to the effect that a marriage solemnized before any person professing to have authority to marry is not void, nor will its validity be in any way affected by lack of title in the officiant, provided, however, such marriage is consummated with a belief on the part of one or both spouses that they were lawfully married.[73]

Another section of the statute reduces the danger of a marriage ceremony being performed by an unauthorized person by providing a penalty for the unlawful joining in matrimony of persons by one who knows he is unauthorized to so act, or for any marriage solemnized contrary to law.[74] These sections provide as

[70]WASH. REM. REV. STAT. § 8441.

[71]State v. Nelson, 39 Wash. 221, 81 Pac. 721 (1905); McDonald v. White, 46 Wash. 334, 89 Pac. 891 (1907).

[72]Knapp v. Knapp, 149 Md. 263, 134 Atl. 24 (1925); MAY, MARRIAGE LAWS AND DECISIONS (1929) 22-23; 18 R. C. L. 401.

[73]WASH. REM. REV. STAT. § 8442; hence it has been held in Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822 (1909), 63 Wash. 526, 115 Pac. 1078 (1911), that a marriage ceremony between a white man and an Indian woman performed by an Indian chief of Christian faith, who assumed to have authority to unite persons in matrimony, was valid under this type of statute.

[74]WASH. REM. REV. STAT. § 8454.

adequate protection to the state and to the parties being married as the lawmaker can expect at this point, at least insofar as preventing unauthorized persons from marrying couples is concerned, and in giving the benefit of any doubt as to the validity of the marriage to the married couple.

As is consistent with our concept of the marriage relation as a civil contract, the Washington statute provides that no particular form of solemnization is required other than the expression of mutual assent before an official designated by the state, in the presence of at least two witnesses.[75] This is essentially the civil contract concept of marriage.[76] And accordingly, as long as the civil contract is validly entered into, a religious solemnization embodying the formation of a contract will not invalidate the marriage.[77]

If the officiant has reason to know of impediments set forth in the section relating to physical and mental disabilities,[78] he is enjoined from performing the ceremony.[79] A violation of the law may entail a severe penalty.[80] Moreover, if he knowingly solemnizes a marriage contrary to statute, the general penalty provisions will be inflicted for such misconduct.[81] It should be noted that this only applies where the officiant *knows* of these defects. Experience has shown that if a couple are refused a ceremony by one celebrant for just cause, it is comparatively easy for them to go elsewhere for the marriage ceremony.[82] These cases should never be allowed to pass the license office in the first instance; if they do, little can be done to notify those officials who might be later asked to perform the ceremony.

There are certain duties placed on the marriage officiant pertaining to the preservation of the record of the marriage, an administrative function of great importance to the state. The person solemnizing the marriage retains the license,[83] but he is required to give each of the parties a marriage certificate containing certain definite information concerning the time and place of the ceremony and the like.[84] This is an additional aid in the preserva-

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[75]WASH. REM. REV. STAT. § 8443.
[76]Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723 (1841).
[77]WASH. REM. REV. STAT. § 8448.
[78]WASH. REM. REV. STAT. § 8439.
[79]WASH. REM. REV. STAT. § 8440.
[80]WASH. REM. REV. STAT. § 8452.
[81]WASH. REM. REV. STAT. § 8454.
[82]In Waughop v. Waughop, 82 Wash. 69, 143 Pac. 444 (1914), one minister refused to marry a couple where the wife as a nurse had drugged her husband just prior to the ceremony, but the case indicates that a marriage was easily had at another place the same evening.
[83]WASH. REM. REV. STAT. § 8453.
[84]WASH. REM. REV. STAT. § 8444.

tion of the record of the ceremony, for the officiant must also deliver to the clerk of the county where the marriage occurred a certificate comparable to the one issued to the parties.[85] If it happens that the license was procured in a county other than where the ceremony occurred, the clerk of the county of ceremony is obliged to send a certified copy of the certificate to the county of license issue, thus providing for a filing of this data in both counties.[86]

The provisions of this law are enforced by a penalty provided for the willful refusal or neglect of the celebrant to make and deliver such certificate to the county clerk.[87] One may question the effectiveness of the latter provision in accomplishing its purpose, since it requires *willful neglect* to create any threat of prosecution, and it fails to anticipate the carelessness of officials in simply neglecting to report these vital statistics. The county clerk, not knowing who the official is, does not know upon whom to call for the record.[88] A possible solution to this problem has already been mentioned, *i. e.,* a follow-up by the auditor through the applicants themselves.

There clearly exists a need for making the ceremony in marriage a more significant occasion,[89] and this has been suggested by one authority as a means of preventing hasty marriages.[90] Other authorities on the problem have recommended a reduction of the number of marriage officiants in order to achieve a similar purpose. Professor Howard has suggested that the law covering the civil ceremony is too lax and that magistrates tend to commercialize the entire procedure.[91] As a remedy for this he urges a re-

[85]WASH. REM. REV. STAT. § 8445.

[86]See WASH. REM. REV. STAT. § 8446, reading: "The judge of the superior court (county clerk) shall file such certificate and record the same in the record of marriages, and the legal fee shall be one dollar, to be paid by the person applying for the license and at the same time such license is issued."

[87]WASH. REM. REV. STAT. § 8447.

[88]See MARRIAGE AND THE STATE, *op. cit. supra note* 62, 295-299, indicating dangers from failure to follow up unreturned licenses.

[89]*Marriage Ceremony*, LXVIII OUTLOOK, 663-664; *Changing Conditions of Marriage*, LXI INDEPENDENT 133.

[90]DEALEY, THE FAMILY IN ITS SOCIOLOGICAL ASPECTS (1912) 106. See also HALL AND BROOKE, AMERICAN MARRIAGE LAWS 19-20, 139.

[91]III HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 189.

See I VERNIER, AMERICAN FAMILY LAWS (1931) § 21, stating: "In the following jurisdictions certain otherwise authorized officiants must file their credentials or obtain a license to solemnize marriages: Ark., Del., D. C., Hawaii, Ky., Maine, Mass., Minn., Nev., N. H., N. Y., Ohio, Okla., Ore., R. I., Va., W. Va., and Wis. Massachusetts requires churches or other religious bodies, to file information in regard to officiants with the state secretary."

Notice the law of Massachusetts (G. L. 1921, c. 207, § 36, as amended by Mass. Laws, 1929, c. 169, p. 189, and § 39, as amended by Mass. Laws,

duction in the number of *civil* officials authorized to perform the ceremony, thus adopting the practice of France, Germany and England. Richmond and Hall suggest that a reduction of civil officials is to be advocated where inadequate check is had upon them, as is the case in most states, and where the fees derived by justices of the peace constitute a major portion of their income, thus lending to the commercialization of marriage. They also recommend central marriage bureaus in large cities and the prohibition of advertising by marriage officiants.[92]

The importance of the marriage officiant's function in representing the state at the formation of the marital union cannot be overestimated. The office, which most certainly should not be conferred upon those who would commercialize the marriage ceremony for personal profit, must be fulfilled with dignity and with a sense of responsibility to the state. In the achievement of proper marriage law administration, this position is a point of control second only to that of the license office itself.

Desirable Trends in Marriage Legislation

In a number of the states and territories of the United States, outstanding laws of various kinds have come into existence during recent years, aimed primarily at definite problems raised by inadequate marriage legislation. More important among such are the medical certification law, the law providing for advance notice of intention to marry coupled with certain residential requirements, sterilization laws, and interstate co-operation in the enforcement of the marriage laws of the separate states.

As is true in Washington, most states have declared certain physical and mental ailments to be disqualifications for marriage. To follow the method adopted in our state, however, of merely requiring the parties to the intended union to swear in their affidavits at the license office that they are not feeble-minded or afflicted with a contagious disease, is to make but a gesture towards enforcing these laws designed to protect public health. Several states have taken decisive steps to give effect to such laws by rquiring medical certification as a prerequisite to the obtaining of a marriage license.[93]

120, 1926): ". . . the governor may in his discretion designate a justice of the peace in each town and such further number, not exceeding one for every 5,000 inhabitants of a city or town, as he considers expedient to solemnize marriages . . ." Properly exercised, this discretionary power should be a means of eliminating commercializing of marriage by these officiants.

[92]Marriage and the State, *op. cit. supra* note 62, 229, 237-238. Vernier, *op. cit. supra* note 91, § 21, cites Kentucky, Maryland, and Massachusetts as legislating against officiants' advertising or soliciting marriage business.

[93]The following states have medical certification laws: Wisconsin, Wis. Stat. (1931) §§ 245.10, 245.11; Ala., Ala. Ann. Code (1928), §§ 1156, 57;

A leading test case of the early Wisconsin Eugenics Law, *Peterson v. Widule,*[94] established the constitutionality of such legislation on the grounds that it was a proper exercise of police power by the state. The court gave considerable encouragement to the new law by stating that mathematical exactness in the medical tests was not required, and that certain reasonable leeway must be allowed the state in the matter of its administration of the law. This progressive step by the Wisconsin legislature gave rise to much public debate on the problem, with not a small number of the medical profession soundly condemning the administrative provisions of the law.[95] The result was a subsequent amendment for the purpose of correcting the more obvious defects. As revised, the law has been said to have conferred a distinct benefit on the state, in spite of inherent defects. It has brought to the public attention a question vital to the welfare of all and many persons have been convinced of the desirability of scientific marriage legislation because of its success.[96]

If effect is to be given to the sections of the Washington law, prohibiting marriages in cases where dangerous mental and physical defects exist,[97] we should consider the adoption of a medical certification law of some description. Before doing so, however, there should be a well-planned campaign throughout the state to enlist the support of the medical profession and civic and religious organizations, in order that the public may be enlightened as to the policy underlying such a statute and that intelligent discussion be brought to bear on the subject before an act is sent to the legislature for final approval. Without a general desire for such radical change, there is much danger that the traditional *laissez faire* attitude toward such matters will prevail and that this law will never become a reality.

Another desirable trend in recent marriage legislation is the advance notice of intention law, the present equivalent of the ancient custom of publishing the bans. Such a law provides for a

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La., LA. LAWS (1924) § 164, p. 264; N. C., N. C. ANN. CODE (1931) § 2500; N. D., N. D. COMP. LAWS (1913) §§ 4373-78; Ore., ORE. ANN. CODE (1930) §§ 33-118 to 33-121; Wyo., WYO. REV. STAT. ANN. (1931) §§ 103-227, 228.

Washington had a type of medical certification law in 1909, Wash. Laws 1909, c. 174, p. 633-34: "The county auditor before a marriage license is issued shall require each applicant therefor to file . . . an affidavit of at least one duly licensed physician . . . showing that the contracting parties are not feeble-minded, imbeciles, epileptics, insane persons, common drunkards, or persons afflicted with pulmonary tuberculosis in its advanced stages . . ." This law was on the statute books in the letter, at least, until its repeal by Wash. Laws 1929, c. 23, § 1.

[94]157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778 (1914).

[95]HALL, MEDICAL CERTIFICATION FOR MARRIAGE (1925) 13-15.

[96]WISCONSIN MEDICAL JOURNAL 84 (July, 1923).

[97]WASH. REM. REV. STAT. §§ 8439, 8440.

waiting period either between the date of application for the license and the date of receipt of the same, or for a period after the issuance of the license and before the ceremony takes place.[98] The latter method may be dismissed from consideration with the remark that it usually fails to achieve its intended purpose, inasmuch as unscrupulous marriage officiants often post-date the certificate and marry the parties immediately after they have procured the license.[99]

The other form of advance notice law is most satisfactory in that it prevents hasty and ill-considered marriages, and also gives the license issuer time to check vital information before issuing the license, thus making that office a very effective point of control in the prevention of marriage law violations.[100] When this statute is combined with a requirement for residence within the county for a reasonable period of time prior to the issuance of the license, it is increasingly effective since there is more opportunity for accurate verification where both parties or either of them are known. Publicity of the application for marriage in local newspapers also allows for interested and informed third parties to submit vital information to the license issuer if they so desire.[101] Exceptions to strict requirements can always be provided for, leaving this decision to the license issuer in cases of emergency such as pre-marital pregnancy or impending death of either applicant. It is submitted that the adoption of such a law in Washington, if coupled with an organized effort by license issuers to check important information in each case, would go far toward reducing the number of undesirable and illegal marriages in the state.

Sterilization, the weeding out of the outfit persons, is a valuable asset to the state that is anxious to prevent the procreation of children who are bound to inherit dangerous physical and mental diseases. The law, applied usually to inmates of various state institutions, has found its principal stumbling block to be the problem of constitutionality. Sterilization laws have been declared unconstitutional in Indiana, Iowa, Nevada, New York, New Jersey and Oregon at one time or another. In Indiana, Iowa, New Jersey and Ore-

[98] VERNIER, *op. cit. supra* note 91 § 16 stating that out of 17 states having such laws, 13 fix the interval between the date of application and the date of license issue, three set it between the date of license issue and date of ceremony, and one uses both methods. Washington has no such law at the present time.

[99] MARRIAGE AND THE STATE, *op. cit. supra* note 62, 109, 284.

[100] VERNIER *op. cit. supra* note 91, § 16; MARRIAGE AND THE STATE, *op. cit. supra* note 62, 52, 150, 163, 179, 183, 184.

[101] DEALEY, THE FAMILY IN ITS SOCIOLOGICAL ASPECTS (1912) 106. See also HOWARD, *op. cit. supra* note 91, 192; HALL AND BROOKE, AMERICAN MARRIAGE LAWS (1919) 18-19; (Apr. 4, 1931) CIX LITERARY DIGEST 23, stating, "Certainly a few days to think it over will save many from unsuitable marriages. And it may forestall many divorces."

gon, invalid laws have later been replaced by valid laws, most of them being modeled after the Virginia statute.[102] The latter law was held constitutional in one of the leading cases on the subject, *Buck v. Bell.*[103] Justice Holmes, in affirming an order of a Virginia court which directed a superintendent of the State Colony of Epileptics and Feeble-Minded to perform an operation of vasectomy on a feeble-minded inmate, stated that the broad public policy of the state in preventing the procreation of offspring doomed to degeneracy or idiocy was adequately founded on the police powers of the sovereignty. The argument that the act failed in its purpose since it applied only to institutionalized defectives and not to others, was swept aside by the court's statement that it is not for the jurist to consider the wisdom of such legislation, and that further, the answer to such objection here was that "the law does all that is needed when it does all that it can." The three basic provisions of the Virginia statute here upheld as insuring due process and equal protection of the law under the 14th Amendment, are (1) the decision of a board of experts, (2) the opportunity for the patient or legal representative thereof to defend, and (3) appeal to the state courts. Within these constitutional safeguards, fifteen states, including Washington, have modeled sterilization laws; of these states, two have had their former laws declared unconstitutional.[104]

In Washington, there is a statute which provides for the operation of vasectomy upon the order of the court in addition to other punishment when one is convicted of carnal abuse of a female under ten years of age, or rape, or shall be adjudged an habitual criminal.[105] In addition to the above statute, passed in 1909, we adopted a statute of the Virginia type in 1921, probably because, as Professor Jacobs states it, we "realized the doubtful value of a sterilization law as a punitive measure."[106] This statute, in brief provides for sterilization of male and female inmates of the state insane asylums when the institutional board, after a careful investigation, shall decide it to be necessary to prevent procreation of defective offspring or for the patient's betterment, and there appears no probability of the patient's improving.[107] It is not a

[102]JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS (1933) 231, note 48. See also, GOODSELL, PROBLEMS OF THE FAMILY (1928) 443; BULLETIN 10 A, EUGENICS RECORD OFFICE (1914) 62.

[103]274 U. S. 200, 47 Sup. Ct. Rep. 584, 71 L. Ed. 1000 (1927).

[104]JACOBS, *loc. cit. supra* note 102.

[105]WASH. REM. REV. STAT. § 2287; in State v. Feilen, 70 Wash. 65, 126 Pac. 75, Ann. Cas. 1914B, 512 (1912), our court held this statute constitutional, inasmuch as there was no showing that the operation would in fact subject the defendant to any marked degree of physical torture, suffering or pain.

[106]JACOBS, *op. cit. supra* note 102, 234.

[107]WASH. REM. REV. STAT. §§ 6958-6968.

punitive measure. Adequate provision is made for notice, hearing and appeal, according to the doctrines of *Buck v. Bell, supra.* Certainly this type of legislation is a step forward. It has, of course, met much opposition, although the constitutional objections at least have been overcome. This new trend in weeding out the unfit should eventually lead to more widespread checking of inheritable diseases, thus giving actual life to the heretofore dormant public policy underlying those sections of our code which prohibit marriage where certain physical or mental impairments exist.

The suggestion made by some that there should be federal supervision of marriage laws is met by the answer that remoteness of control under such a plan would persuade local officials to treat their share of law enforcement as transferred to distant bureaus. Since the problem is essentially a local one, community custom and local conditions which form the background of most marriages must be taken into consideration in shaping marriage laws.[108] From such viewpoints, the argument to turn over the task of enforcing marriage laws to the federal government carries its own refutation. A desirable alternative to federal supervision, however, is the selection of individual laws designed to meet the problems of the particular state, with the addition of reciprocal marriage evasion laws among states. If those states having lower standards will co-operate, they may, by setting forth strict residential and advance notice requirements for persons from adjoining states who have crossed the state line to be married, protect the high standards set in the adjoining states which wish to experiment with progressive marriage legislation. Applying only to residents of other states, these reciprocal agreements would not offend the residents of the states adopting them. This accommodation among states has been recommended after an extensive survey of various methods of interstate adjustment.[109]

A study of our marriage laws and of the public policy they are designed to promote compels the conclusion that a revision of our administrative practices in the matter of law enforcement is necessary. Of the present marriage laws, it may perhaps be said that they fall short of their intended purpose principally because of the fact that they are not complete enough. Criminal penalties for violations are plentiful, and, on the whole, as adequate as can be

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[108] HALL AND BROOKE, AMERICAN MARRIAGE LAWS (1919) 9-12; RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 190-206, 337; JACOBS, *op. cit. supra* note 102, 149 n.

[109] MARRIAGE AND THE STATE, *op. cit. supra* note 108, 207. It is stated in (1932) XXII AM. JOUR. OF PUBLIC HEALTH 1887: "Only eleven states reported increased marriage rates for 1931 . . . of these, eight adjoin states in which recent changes in marriage laws were made . . ."

expected. If one is to lay emphasis, however, on the prevention of the unsocial marriage in the first instance, rather than on the unsatisfactory method of penalizing all parties concerned after the damage has been done, then we should make available to the license issuer and the marriage officiant the greatest powers possible in order that the latter may perform their duties with maximum efficiency.

It is submitted that there is need for inter-country co-operation in administering the licensing requirements of the law. There should be some agency, either voluntary or public in nature, that can act as a clearing house for information for the counties, Unification of license office practices with the help of such agency could then become a reality. The license laws should be improved to include more detailed information in the affidavits sworn to by both candidates and should also be more specific as to just what the license issuer is empowered to do in cases where he believes a violation of the law is taking place. These are improvements which need not be delayed until the public is ready to accept them. They pertain solely to making the law as it stands today more practicable from an administrative point of view.

Other desirable improvements require more long-range planning. Such are the accomplishment of inter-state co-operation toward preventing marriage law evasion across state borders. Medical certification laws, advance notice laws and improved sterilization laws also come within this category. Public opinion must be aroused to the point where it will welcome these improvements, and this will, of course, require time and public education. None the less, so important are these new trends in marriage legislation that their adoption must be made a reality in the near future. Few reforms can be more vital to this state than those which are directed toward preventing the spread of physical and mental diseases to future generations and minimizing the unfortunate consequences of family disorganization. In bringing its marriage laws and their administration up to date, the state of Washington will make considerable progress toward these goals.‡

‡Condensed from a thesis submitted for the Juris Doctor degree, University of Washington Law School, June, 1936.